IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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OPINIONS BELOW.

The opinions and orders of the district court striking the class action allegations (December 6, 1972), dismissing the action after settlement with named plaintiffs and intervenors (October 3, 1975), and denying intervention to respondent (October 21, 1975), are unreported and appear in Appendix at 55, 90, and 102, respectively. The opinion of the court of appeals is reported at 537 F. 2d 915 (7th Cir. 1976) (Appendix 104).

JURISDICTION.

The judgment of the court of appeals was entered on July 1, 1976. A timely petition for rehearing and suggestion for in banc rehearing was denied on September 1, 1976. A timely petition

for writ of certiorari was filed on October 19, 1976. The Court granted the writ of certiorari on December 6, 1976. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The relevant portions of Section 706(e) and (f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(e), (f), are set forth below.

> Sec. 706. (e) A charge under this section shall be filed within 180 days after the alleged unlawful employment practice occurred. . . .
>
> Sec. 706. (f)(1) . . . If a charge filed with the Commission . . . is dismissed by the Commission . . . or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

Federal Civil Procedure Rule 23, Class Actions, and Rule 24, Interventions, are set out in an appendix to this brief, *infra*.

QUESTIONS PRESENTED.

A class action was filed in May 1970, claiming violation of Title VII of the Civil Rights Act of 1964. In December 1972 the class allegations were stricken on the motion of defendant—petitioner here. A number of the purported class members then intervened. Respondent McDonald, although a member of the claimed class, did not seek to intervene. In October 1975, a final order of dismissal with prejudice was entered after settlement with named plaintiffs and intervenors. Thereafter respondent attempted to intervene for the purpose of appealing the December 1972 denial of class status.

1. Did the statute of limitations, tolled upon filing of the class action, commence running upon denial of class status in December 1972 under the doctrine of *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974)?

2. Did the district court err in denying respondent's motion to intervene, as the majority of the court of appeals held?

STATEMENT OF THE CASE.

Background.

This case comes before the Court as the most recent manifestation of a series of cases which have been weaving their way through the federal courts since November 1968, arising out of petitioner United's long-abandoned "no-marriage" rule for female flight attendants.[1]

Until November 7, 1968, it was United's policy to terminate stewardesses (now called "flight attendants") upon marriage (although transfer to an available non-flying position was permitted). On that day, United entered into a formal agreement with the Air Line Pilots Association ("ALPA"), the collective bargaining agent for the flight attendants, ending the "no-marriage" rule. The agreement also provided that any flight attendant whose employment had been terminated because of the rule and who had registered some form of complaint about the termination—either through the contractual grievance procedure or through a federal or state agency—would be entitled to reinstatement without loss of seniority but without back pay. A. 20.

1. *United Air Lines* v. *Evans*, No. 76-333, now before this Court, relates to the "no-marriage" rule. Other cases include *Lansdale* v. *United Air Lines*, 437 F. 2d 454 (5th Cir. 1971); *Collins* v. *United Air Lines*, 514 F. 2d 594 (9th Cir. 1975); *Sprogis* v. *United Air Lines*, 308 F. Supp. 959 (N. D. Ill. 1970), 444 F. 2d 1194 (7th Cir. 1971), *cert. denied* 404 U. S. 991 (1971), 56 F. R. D. 420 (N. D. Ill. 1972), 517 F. 2d 387 (7th Cir. 1975); *Inda* v. *United Air Lines*, 405 F. Supp. 426 (N. D. Cal. 1975); *Buckingham* v. *United Air Lines*, Civ. No. 71-731-LTL (C. D. Cal. 1975).

Several of the eligible flight attendants accepted the reinstatement offer; others were not heard from; some instituted civil actions, seeking back pay as well as reinstatement.

The first action was filed by Mary Burke Sprogis on November 27, 1968 in the Northern District of Illinois, claiming the no-marriage rule violated the sex discrimination provisions of Title VII of the Civil Rights Act of 1964.

In *Sprogis* v. *United Air Lines,* 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U. S. 991 (1971), the court of appeals affirmed the trial court's holding that the no-marriage policy did violate Title VII as discrimination in employment based on sex. The court of appeals remanded to the district court the reserved question whether the action—commenced as an individual suit—could be converted to a class action after judgment.

In May 1970, while the *Sprogis* case was pending on appeal, this action—filed as *Romasanta* v. *United Air Lines*[2]—was commenced as a class action by another former flight attendant apparently as a hedge against a possible adverse determination in the court of appeals in *Sprogis* on the class action question. The claimed class was the flight attendants terminated pursuant to the no-marriage policy. A. 11. Both the *Romasanta* and *Sprogis* cases were financed by ALPA, and plaintiffs in both suits were represented by the same counsel. Both cases were assigned to the same district judge.

The *Romasanta* case was held on the passed case calendar pending the decision on appeal in *Sprogis.* A. 1. After the court of appeals remanded *Sprogis,* plaintiffs moved to certify a class in *Sprogis* and to consolidate the two cases. A. 23.

In June 1972, the trial court ruled that class action was not appropriate in *Sprogis* and denied the plaintiffs' motion to consolidate. 56 F. R. D. 420 (N. D. Ill. 1972). A. 25. No appeal

2. Carole Anderson Romasanta was plaintiff in the trial court. The suit was ultimately settled and dismissed as to her and she was not a party to the appeal below, although her name appeared in the caption as plaintiff. Liane Buix McDonald, respondent here, was petitioning intervenor in the trial court and appellant in the court of appeals. See A. 104.

was taken by plaintiff Sprogis or any purported class member, including respondent here, from this decision.[3]

After the district court refused to consolidate the two cases, United moved to strike the class allegations in *Romasanta,* and on December 6, 1972 this motion was granted. A. 55.

The trial court believed that the class should be limited to those who had manifested an interest in retaining their jobs by filing some protest. The legal issues had been settled in *Sprogis;* four years had elapsed since the no-marriage rule had been abrogated; and therefore the district court was concerned that former flight attendants who had had no real interest in continued employment would now join the action solely to recover back pay. The court stated A. 60:

> In considering the equities, it does not seem fair and reasonable to this court that it should allow a stewardess terminated prior to November 7, 1968 to intervene here unless she indicated in a timely manner her desire to continue working by taking some affirmative action to protest United's policy or seek reinstatement.[4]

3. The district court referred to a special master the issue of a back pay award for Ms. Sprogis. The Court approved the master's award of $10,408 but denied an award of attorney fees. After final judgment the denial of attorney fees was appealed, but not the refusal to certify a class. *Sprogis* v. *United Air Lines,* 517 F. 2d 387 (7th Cir. 1975).

4. The record disclosed that after the no-marriage rule was abrogated a substantial number of flight attendants continued to terminate employment on marriage. Thus, between November 7, 1968, when the rule was abrogated, and December 31, 1971, 455 flight attendants resigned assigning marriage as the reason. Another 363 went on leave of absence because of marriage and did not return upon termination of the leave. A. 54. In the court of appeals, Ms. McDonald cited a stipulation between United and the Equal Employment Opportunity Commission in another case to the effect that between 1969 and 1973 (during which period the no-marriage rule was *not* in effect) 913 out of 3,599 flight attendant terminations were because of marriage, Pet. Br. Ct. App. 10n. It was thus reasonable for the district judge to require some evidence of interest in continuing in the job before admitting a flight attendant discharged four years earlier to a class where the only issue would be the amount of back pay recovery.

The appropriate class being limited to those flight attendants who had made some timely protest against the no-marriage policy, the class allegations were stricken since the numerosity requirements of Rule 23 were not met. Those who had protested the policy, and had not already settled their claims or initiated actions elsewhere, were permitted to intervene.

Twenty-five former flight attendants sought intervention. Respondent McDonald was not among them. Intervention was allowed as to thirteen; eight were denied because they had accepted reinstatement under the November 1968 agreement; four who had instituted actions elsewhere were also denied intervention. A. 58-60.

The named plaintiffs Romasanta and Altman[5] unsuccessfully petitioned for permission to appeal under 28 U. S. C. § 1292(b) the trial court order of December 6, 1972. None of the individuals denied intervention made any attempt to appeal, although the order was clearly final and appealable as to them.[6]

Discovery and settlement discussions followed and the initial and intervening plaintiffs were able to settle their back pay claims by application of the principles worked out in *Sprogis*. A. 91. On October 3, 1975—almost three years after class action status was denied—a final order dismissing the suit with prejudice was entered, all "matters in controversy . . . having been settled and resolved." A. 90, 92.

Three weeks later, on October 21, 1975, respondent McDonald first entered the scene. Ms. McDonald is a former United flight attendant who was terminated in September 1968 under the then existing no-marriage policy. She filed no grievance under the collective bargaining agreement, no charge with any state or federal agency, participated in no litigation, and had in no manner previously made known her belated claim against

5. In October 1970 Brenda Altman, another former flight attendant, was added as a party plaintiff.

6. An order denying intervention is final and appealable. *EEOC* v. *United Air Lines*, 515 F. 2d 946, 948-49 (7th Cir. 1975).

United. She was fully aware of the *Romasanta* and *Sprogis* litigation and of the denial of class status in December 1972 (A. 95), but took no action of any kind until October 21, 1975.

On that day Ms. McDonald filed a motion to intervene for purposes of appealing from the December 1972 order denying class action status. A. 93. Submitted with the motion was an affidavit of Ms. McDonald stating, *inter alia*, that she "had previously been informed that during the course of this lawsuit, the Court had struck the class action allegations and so excluded me and others like me from this action. . . ." A. 95.

The trial judge denied the motion to intervene as untimely. During hearing on the motion he expressed concern that respondent McDonald had not sought intervention at the time of his December 1972 order, or to appeal from or seek modification of that order. He concluded (A. 101):

> Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end. I must deny this motion.

Ms. McDonald then filed two notices of appeal, one appealing the denial of intervention and the other appealing the order of December 6, 1972, denying class action status. A. 103.

The Decision of the Court of Appeals.

The court of appeals reversed in a two-one decision. The majority held the motion to intervene was timely under Federal Rule 24(b) since it was filed soon after respondent McDonald was advised by the named plaintiffs that they would not appeal the order of December 1972 denying class status. The majority rejected United's contention that under *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), the limitations period started to run against Ms. McDonald in December 1972 when the trial court denied class status and this limitation period had long since expired. The majority dis-

tinguished *American Pipe* in a footnote, on the ground that in Title VII actions the statute was tolled upon the filing of a charge with the Equal Employment. Opportunity Commission ("EEOC")—a non sequitur since the issue on appeal was not the commencement of the tolling period, but rather when the statute started to run again. A. 108 n.6.

Having concluded that Ms. McDonald was entitled to be an intervenor, the majority held it had "power to examine the adverse class ruling." In a one paragraph examination of the class issue (with which the district judge had wrestled through numerous hearings and briefings), the majority decided the order denying class action status "must be reversed." A. 109.

Judge Pell, in dissenting, stated that under *American Pipe* the statute of limitations began to run again in December 1972 upon denial of class action status, and that Ms. McDonald had to act promptly thereafter "if she wanted to take advantage of this lawsuit as a forum for her claims." A. 110. He concluded by stating that since the timeliness issue was dispositive, "I have not deemed it necessary to advert to the other issues raised on this appeal." A. 115.

The eight active members of the court of appeals divided four-four on the suggestion of a rehearing in banc. A. 117.

ARGUMENT.

Summary.

American Pipe & Construction Co. v. *Utah*, 414 U. S. 538, 561 (1974), holds that the applicable statute of limitations is tolled upon the filing of a class action but "only during the pendency of a motion to strip the suit of its class action character."

The district court here denied class action status in December 1972. The attempted intervention by respondent was properly denied in October 1975 since the attempt came more than

two years after the expiration of any conceivable applicable limitation period.

The majority of the court of appeals erroneously assumed, contrary to *American Pipe*, that tolling of the limitations period continued after class action denial and at least until the final order of dismissal by the district court in October 1975. Intervention was considered timely because it was attempted soon after respondent McDonald learned that the named plaintiffs and intervenors did not intend to appeal class denial after entry of the final order.

Plaintiffs and intervenors had no obligation to appeal class denial after final judgment and could not appeal since they had settled their claims and their complaints were dismissed with prejudice. Respondent acquired no derivative right from them.

The decision below, if it prevails, would frustrate settlement after class denial since parties will be required to await exhaustion of appellate review of class denial after final order before knowing the limits of potential liability. The capacity of the district court to manage suits after class denial will be impaired.

Class actions under Title VII are subject to the requirements of Federal Civil Procedure Rule 23, as are all class actions, and *American Pipe* is not distinguishable because it involved an anti-trust class action.

Respondent's claimed reasons for waiting seven years after termination of her employment, five years after commencement of this suit and three years after denial of class action are not plausible. Had she been interested in continued employment with United she could have been reinstated within weeks after her termination in September 1968.

The statute of limitations aside, the district court did not abuse its discretion under Federal Civil Procedure Rule 24(b) in concluding that respondent's attempt to intervene after the entry of the final order was not timely.

I.

This Court's Decision in American Pipe Mandates Reversal of the Decision of the Court of Appeals.

American Pipe & Construction Co. v. *Utah,* 414 U. S. 538, 540 (1974), "involve[d] an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts."

There an anti-trust class action had been commenced 11 days before the applicable one-year statutory period expired. Seven months later the trial court issued its order denying class action status, basing it upon lack of numerosity. Eight days thereafter a number of potential class members sought to intervene. Intervention was denied by the trial court on the theory that denial of class status had the effect of "untolling" the statute of limitations as though the class suit had not been filed. Since the remaining 11 days statutory period had long expired, the intervenors were too late.

The court of appeals disagreed and held that permissive intervention was timely under Rule 24(b)(2) since, for limitations purposes, the rights of intervenors related back to the commencement of the suit. *Utah* v. *American Pipe & Construction Co.*, 473 F. 2d 580, 584 (9th Cir. 1973). Certiorari was granted to "consider a seemingly important question affecting the administration of justice." 414 U. S. at 545.

After examining the development of Rule 23 both before and after the 1966 amendments, this Court concluded that "at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class *who make timely motions to intervene.*" 414 U. S. at 553. (Emphasis added.)

In its conclusion, the Court fleshed out the concept of "timely" and the duration of tolling (414 U. S. at 561):

> [T]he commencement of the class action in this case suspended the running of the limitation period *only during the pendency of the motion to strip the suit of its class action character.* The class suit brought by Utah was filed with 11 days yet to run in the period as tolled by § 5(b) [of the Clayton Act], and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of Judge Pence's order, it follows that the motions were timely. [Emphasis added.]

Justice Blackmun's concurrence expressed some concern lest the decision be construed as an open invitation to revival of stale claims.[7] The concurring opinion cautioned (414 U. S. at 561):

> Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.

Referring to Rule 24(b), Justice Blackmun observed (*Id.* at 562):

> Permissive intervenors may be barred, however, if the district judge, in his discretion, concludes that the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. Rule Civ. Proc. 24(b). The proper exercise of this discretion will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

It appeared to petitioner United that this decision had critical relevance to a consideration of the propriety of the district judge's ruling denying Ms. McDonald's motion to intervene

7. So described in 3B Moore's Federal Practice Par. 23.90 at 23-1653 n.11 (1975 Supp.).

five years after the suit commenced, three years after denial of class status, and after final dismissal of the action with prejudice upon settlement of the claims of named plaintiffs and intervenors. Accordingly, its importance was stressed to the court of appeals.

The court of appeals majority opinion disposed of *American Pipe* in a footnote (A. 108):

> 6. See also *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 551. The specific holding in *American Pipe* that the statute of limitations is tolled only during the pendency of the motion to certify a class and begins to run anew if the motion is denied is not applicable here. The statute of limitations in Title VII actions is suspended once one member of the class initiates the grievance mechanism. See *Bowe* v. *Colgate-Palmolive Co.*, [416 F. 2d 711, at 720 (7th Cir. 1969)].

The reference to *Bowe* was irrelevant: the holding of *Bowe* and other cases, including *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 (1975), that unnamed class members need not exhaust administrative procedures is not in issue here. Certainly at least one named plaintiff must pursue the administrative remedy and file a suit within the statutory period to meet the "jurisdictional prerequisites to a federal action."[8] The issue here is not the initial tolling, but rather when the limitations period begins running again. With respect to this issue, the majority opinion of the court of appeals did not explain why the tolling was not lifted in December 1972 with the order of denial of class action status, as *American Pipe* appears to require.

In concluding that the petition to intervene was timely under Federal Rule 24(b)—permissive intervention—the majority stated (A. 109):

8. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973). Named plaintiff Romasanta did in fact meet the time requirements of Title VII, both as to filing a charge with the EEOC within the then applicable 90 day period and initiating the suit within the then applicable 30 day period after receipt of notice of right to sue. Complaint. ¶¶ 2, 10. A. 12, 13.

> [I]n court . . . the members may rely on the champion of the class until he or she abdicates. In this case we believe that abdication occurred when plaintiffs decided not to appeal the adverse class action determination. To hold otherwise would permit one member of the class to obtain benefits greater than other members.

The "abdication," held the majority, came two weeks after the final order of dismissal of October 3, 1975, when the individual plaintiffs who had settled their claims allegedly advised Ms. McDonald they had decided not to appeal the class action denial of December 1972.

The vice in the majority decision is its assumption that the class action continued after class status was denied. This is inconsistent with *American Pipe*, which holds that tolling continues only until that point. If this Court's view was that class status would continue after denial by the district court on the possibility that there might eventually be a successful appeal of the denial, then its comment that interventions were timely because they came within 11 days of the denial order is inexplicable.

Pearson v. *Ecological Science Corp.*, 522 F. 2d 171 (5th Cir. 1975), *cert. den.* 425 U. S. 912 (1976), followed *American Pipe* in a decision which considered a number of issues relating to the duty of the parties remaining after class denial to the purported members excluded by the class denial. One claim was that after class denial notice of a subsequent settlement between the named plaintiffs and intervenors and defendant should have been given to the proposed, but denied, class. To this the court responded (522 F. 2d at 176-77):

> The arguments of the appellants and the S.E.C. [amicus] ignore the difference between a class action and a non-class action. They place undeserved emphasis upon mere allegations of class action status by individual plaintiffs, rather than upon a judicial determination that a cause of action does not meet the requirements of subdivisions (a) and (b) of Rule 23 and, therefore, may not be maintained as a class action.

* * * * *

> Appellants and the S.E.C. ask this court to extend the judicial gloss on subdivision (e) of Rule 23 to encompass the situation where as here the trial court has determined prior to the execution of a settlement agreement that the action may not be maintained as a class action under Rule 23. This we decline to do. As stated by the Advisory Committee's Notes to Rule 23, *"a negative determination* [of class action status] means that *the action should be stripped of its character as a class action."* Advisory Committee Notes, *supra,* 39 F. R. D. at 104 [Emphasis in original.]

When here the majority of the court below spoke of the "abdication of the champion of the class" in October 1975 to justify respondent's belated intervention, it clearly ignored the fact that once the class was denied in December 1972, there was no longer a class to champion. The named plaintiffs did not abdicate as champions in October 1975; they were dethroned in December 1972.

Judge Pell in dissent put the issue succinctly (A. 115):

> When a class action is denied, former putative class members may not ignore this fact and continue on the assumption the suit is a class action. . . . The denial of class status is a critical point which puts putative class members on notice that they must act to protect their rights. The tolling procedure established by the Supreme Court in *American Pipe* . . . would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must make "timely motions to intervene." (414 U. S. at 553.)[9]

In our view, *American Pipe* permits of no other reading than that given it by the dissent. If the intervenors there had not moved within the 11 days remaining of the suspended period,

9. Judge Pell pointed out that had Ms. McDonald acted promptly after denial of class action and had been denied intervention at that time because of her failure to protest the no-marriage rule—the requirement which was the basis of the district court's holding that the action lacked the requisite numerosity—"then that issue would have been before this court and decided three years ago." A. 114.

their efforts would not have been "timely." No other reading is possible.[10]

It is the fact, of course, that instead of entering into settlement discussions with defendant, the named plaintiffs and intervenors could have persisted through full trial to judgment and after final judgment could have appealed the denial of the class action of December 1972. But they chose not to do so and instead did enter into a settlement and agreed to a final order dismissing the actions with prejudice. As a result of this they could no longer appeal the denial of class.[11] They had no duty or obligation to respondent McDonald not to settle their claims, and Ms. McDonald could gain no derivative rights of appeal from them. The most she could do was hope they might appeal, but she had no legal right to expect it. If the limitations period had already run against her, it could not be revived because the individual claimants remaining after class denial chose to settle rather than continue the litigation.

10. Two courts of appeal have considered this corollary of *American Pipe.* In *Pearson* v. *Ecological Science Corp.,* 522 F. 2d 171, 178 (5th Cir. 1975), *cert. den.* 425 U. S. 912 (1976), the court concluded that any party who failed to seek intervention after class action status denial and entry of a settlement stipulation "can blame no one but himself if his action is now barred." In *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.,* 511 F. 2d 1073 (10th Cir. 1975), a class was certified narrower than the claimed class. Excluded members attempted intervention but were held to be time-barred. The argument was made that this differed from the *American Pipe* situation because here a class had been certified and there intervention had been allowed. In rejecting these contentions the court held (511 F. 2d at 1078):

> In the instant case 26 days of the suspension period remained when class status was denied the private contractors. The first petitions in intervention were presented 40 days thereafter. *American Pipe* may not be distinguished on the differences between the two cases for denial of class status, or on the fact that there intervention was permitted and here it was denied. The holding in *American Pipe* cuts both ways.

11. Counsel for named plaintiffs and intervenors stated in open court after the final order had been entered: "They have settled their individual claims, and consequently the original class action representatives are not in a position to take the appeal." A. 100-1.

This issue was also confronted in *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171 (5th Cir. 1975), *cert. den.* 425 U. S. 912 (1976). There—as here—class had been denied, timely intervention had been allowed, an interlocutory appeal of denial of class was attempted, and then settlement was reached. An effort was then made to block the settlement by, among others, a late-comer who was denied intervention as untimely sought. Argument was made that the settlement—which included an agreement to voluntarily withdraw a petition for writ of certiorari to review the refusal of the court of appeals to consider the denial of class—breached the obligation the named plaintiffs and intervenors had to the purported class members. The court demurred (522 F. 2d at 177):

> The rule which appellants ask this court to adopt would require that in every action in which class action certification is denied by a district court, the named plaintiffs would be precluded from executing a settlement of their individual claims, and would be required to litigate through appellate review of the interlocutory order denying class action certification after a final judgment in the trial court.

Settlement is always preferred to litigation; Title VII suits are certainly no exception to the principle. The Seventh Circuit Court of Appeals has itself recognized this policy in an earlier decision. ". . . As a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis . . . on private settlement and the elimination of unfair practices without litigation.' "*ALSSA* v. *American Airlines*, 455 F. 2d 101, 109 (7th Cir. 1972), citing *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 498 (5th Cir. 1968).

The majority decision here imposes the same inhibiting effect on settlement noted in *Pearson* since the defendant will not know the full breadth of the claims against it after class action denial unless and until there is opportunity for appellate review after final judgment. The capacity of the district court to manage suits

after class denial is also seriously impaired. It is difficult to encourage settlement among litigants when the judge is faced with the possibility of a renewal of the litigation even if settlement is consummated. He will not be able to address the issues as limited by him because he will be forced to look over his shoulder to purported class members, unknown to the court, who like respondent McDonald may someday appear.[12] This flies directly in the face of the express policy in favor of conciliation and voluntary settlement stated in Title VII. 42 U. S. C. § 2000e-5(b).

There is, to our knowledge, no serious dispute with the proposition that Federal Rule 23 applies to class actions under Title VII. This has been repeatedly affirmed.[13]

Further, we do not believe respondent McDonald would deny that, if the limitations period began to run against her and others

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12. Conceptually there is no end to the process. Ms. McDonald claims a class broad enough to include not only flight attendants who were terminated but also those who resigned without protest. If this case is remanded to the trial court a class could be found which includes those terminated, like Ms. McDonald, but excludes those like Ms. Evans, respondent in No. 76-333, now pending before this Court, who resigned. When that has run its course and a final order is entered, then Ms. Evans or someone in a similar position could do just as Ms. McDonald did here and seek to start the whole process over again. The possibilities are limitless.

13. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (3d Cir. 1975), cert. den. 421 U. S. 1011 (1975) ("The mandatory requirements of Rule 23(a) must first be met."); *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (5th Cir. 1968) ("We thus hold that a class action is permissible under Title VII . . . within the following limits. First, the class action must . . . meet the requirements of Rule 23(a) and(b)(2).") *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058, 1062 (8th Cir. 1975) (". . .[W]e cannot say that the trial court abused its discretion in refusing to certify the class under Rule 23(a)."); *Nance* v. *Union Carbide Corp.*, 540 F. 2d 718, 723 (4th Cir. 1976) (". . . [E]mployee discrimination suits do not represent exemptions from the terms of the Rule [23(a)].")

similarly situated upon denial of class action status in December 1972, any conceivable period has long since run out.[14]

Ms. Romasanta, the original plaintiff, received the required statutory notice[15] from the EEOC on April 17, 1970 (A. 13), and she filed her class action on May 15, 1970—the 28th day of the then allowable 30 day period for bringing suit under Section 706(f). 42 U. S. C. § 2000e-5(f). Thus there were two days left to the limitations period at the time the suit was filed. Assuming the 90 day period provided under the March 1972 amendments to Title VII would be applicable at the time the suit was dismissed in December 1972, Ms. McDonald would have had 62 days (90 less 28) in which to move to intervene, and if unsuccessful, to then appeal that denial.

Even if it be assumed that Ms. McDonald would at that time have been entitled to avail herself of the entire statutory period for filing a charge with the EEOC on the theory her obligation to file had been tolled by the filing of a charge by Ms. Romasanta prior to Ms. McDonald's termination, that period would have been 180 days from December 6, 1972. Section 706(e), 42 U. S. C. § 2000e-5(e).

In any event, whichever period is considered—62 days under Section 706(f) or 180 under Section 706(e)—the last day on which Ms. McDonald could possibly have made a motion in this case not time barred would have been June 4, 1973, almost two and one-half years before she did in fact file a motion to intervene.

In summary, *American Pipe* holds that the limitations period, tolled upon commencement of a class action, starts running again upon denial of class status; class actions under Title VII are

14. The EEOC in an amicus brief filed in the court below conceded that the "statute of limitations in the Romasanta and Altman [the additional named plaintiff] charges has since run." EEOC Br. Ct. App. 20.

15. The procedure is outlined in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973).

not unique and the *American Pipe* doctrine is applicable here as in any other class action; the limitations period expired no later than June 4, 1973; when Ms. McDonald attempted to intervene on October 21, 1975, the statute of limitations had run as to her claim and her motion was untimely under Rule 24(b)(2).

II.

The District Court Did Not Abuse Its Discretion in Denying Intervention.

There is an undertone to the majority opinion below which suggests that an injustice would have been done respondent had the court of appeals not reversed the district court's ruling on intervention. "To hold otherwise," said the majority, "would permit one member of the class to obtain benefits greater than other members." A. 108.

But this is the effect of timeliness requirements and statutes of limitations in all litigation, including class actions.[16] If the

16. The ruling below creates the anomaly that parties who unsuccessfully brought their own suits to protest United's former no-marriage rule are now barred by the statute of limitations and *res judicata* from being granted relief while respondent and other purported class members at this time unknown, who have done nothing for at least eight years, may now seek recovery. Several former United stewardesses who had been terminated because of the no-marriage rule filed an action in 1971 in the United States District Court for the Central District of California. The trial court denied relief because the plaintiffs, who had been terminated in 1966 and 1967, had not filed timely charges in accordance with the provisions of Title VII. *Buckingham* v. *United Air Lines, Inc.*, Civil No. 71-731-LTL. In addition, Doris Collins, who resigned in May, 1967, filed a charge with the EEOC in November, 1971 and instituted an action in the Western District of Washington in November, 1972. She was denied relief by the trial court because her charge was not timely filed. This action by the trial court was affirmed by the Ninth Circuit in *Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594, 596 (9th Cir. 1975). Because of the lawsuit pending at that time in the District Court, Collins was denied intervention in this case below. And, in reliance on the *Collins* opinion, summary judgment was granted on August 5, 1975 by the trial court below against Lynn Mason Raymond, a purported class member who had been allowed to intervene in 1972. This dismissal was not appealed.

intervenors in *American Pipe* had waited four more days the named plaintiffs would also have "obtained greater benefits." Rights are created by the legislature subject to being exercised within a proscribed period. When the period ends, the right ends. The court majority described a consequence of limitations periods—not a reason for ignoring them.[17]

The other side of the coin is that a potential defendant has the right to know that if claims are not asserted against it in an expeditious manner, *i.e.*, within the limitations period, then its exposure is ended.[18]

The record here dramatically illustrates the real inequity in this case. Respondent had no interest in further employment with United after her termination in September 1968. If she had she could have been back at work within a few weeks by simply talking some action to protest the termination.

17. "In defining Title VII's jurisdictional requirements 'with precision,' . . . Congress did not leave to courts the decision as to which delays might or might not be slight." *IUE* v. *Robbins & Myers*, 45 U. S. L. W. 4068, 4070 (S. Ct., Dec. 20, 1976).

18. The majority opinion states that "until October 17th [1975] defendant [United] could reasonably expect this liability to be enforced through an appeal of the adverse class ruling." A. 108. This observation is completely without record support. Once settlement discussions were started United had every reason to believe there would be no appeal of the class issue.

One additional reason why United could assume there would be no appeal of the class denial lies in a point made by respondent McDonald in the lower court in justification of her assumption named plaintiffs would appeal class denial: ". . . plaintiffs' attorneys are interested in obtaining a class treatment on appeal since it has the prospect of a larger overall recovery and the resulting increased potential for court awarded fees." Pet. Reply Br. Ct. App., 17n.

The fact is the district court had denied attorney fees to plaintiff's counsel in *Sprogis* on July 3, 1974, and the denial had been affirmed by the court of appeals on June 4, 1975. *Sprogis* v. *United Air Lines*, 517 F. 2d 387 (7th Cir. 1975). The same counsel represented the parties in this case under the same circumstances which led to denial of fees in *Sprogis*. It was thus apparent that to the extent pursuit of attorney fees could be considered an incentive to appeal class denial, that incentive was certainly lacking here. Attorney fees were in fact subsequently denied in this case on the same grounds as in *Sprogis*.

The November 7, 1968 agreement between United and ALPA terminating the no-marriage policy provided for reinstatement for those flight attendants who protested. At the time of that agreement a protest by Ms. McDonald would have been timely. But she did nothing. She waited from September 1968 to October 1975 to come forward to claim reinstatement and back pay for the seven year period. The majority opinion consoles United with the observation that "This opinion does not preclude the defendant from mitigating liability or rebutting the damage claim of some members of petitioner's [McDonald] class." A. 110 n.8. But assembling rebuttal evidence at this late date is an awesome burden.[19]

Respondent explains her seven years of inaction in an affidavit submitted with the intervention petition (A. 95):

> At the time of discharge or soon thereafter, I learned that other former United Air Lines stewardesses who had been discharged pursuant to the same policy were prosecuting grievances under the collective bargaining machinery or had filed charges of discrimination with state and federal agencies. Since the legality of the no-marriage policy was being challenged in proceedings that I thought would govern my situation, I did not myself file a discrimination charge against United or grievance under the collective bargaining agreement.

This reason—even if plausible—does not explain why she did not act then to get her job back under the terms of the United-ALPA Agreement.

But the reason is not plausible. In September 1968, it was not settled law that an individual could rely on the charge of another in pursuing a claim under Title VII. *Oatis* v. *Crown Zellerbach*, 398 F. 2d 496 (5th Cir. 1968), had reversed a

19. The court of appeals had held in *Sprogis* that United had to demonstrate that a claimant lacked reasonable diligence in seeking other employment, and that "the burden of going forward to mitigate the liability, or, to rebut the damage claim, rests with the defendant." *Sprogis* v. *United Air Lines*, 517 F. 2d 387, 392 (7th Cir. 1975).

lower court which held that class action would not lie under Title VII where injunctive relief was sought. The appeals court decision was issued on July 16, 1968, and was limited to prospective relief. However unlikely, it is possible that Ms. McDonald knew about *Oatis* when she was terminated in September 1968. But she would also have known it did not sanction a class action for back pay—and as we have noted she could have had prospective relief under the ALPA-United Agreement of November 1968. It was not until October 1969 when the Seventh Circuit Court of Appeals promulgated its decision in *Bowe* v. *Colgate-Palmolive*, 416 F. 2d 711 (7th Cir. 1969), that there was a definitive holding that a class action would lie under Title VII for "pecuniary" as well as injunctive relief. 416 F. 2d at 720. In fa ', this issue was not conclusively settled until this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 (1975).

The original case of *Sprogis* v. *United Air Lines* (see *supra*, at p. 4), was not brought as a class action, no doubt, because when filed in November 1968 prospective relief was unnecessary since the no-marriage policy had already been abrogated, and *Bowe* had not yet been decided. It was only after *Bowe* that an attempt was made to convert *Sprogis* to a class action and that this suit was filed as a class action.

Ms. McDonald simply could not have known in September, 1968 that she could rely on actions taken by others. Her explanation for seven years of inaction is inadequate. She has, indeed, slept on her rights.

Moreover, however inexplicable is her claimed reliance in 1968 on legal doctrines not definitely established in this Court until 1975, it is clear that Ms. McDonald did know that after December 1972 she was no longer in this case—and yet she still failed to act.

Her affidavit is quite candid. She states she had "previously been informed that during the course of this lawsuit, the Court had struck the class action allegations and so excluded me and

others like me from this action and that an attempt to appeal this ruling had not been successful." A. 95.

Certainly the exclusion of Ms. McDonald from this suit in 1972 was a critical point for her. In *NAACP* v. *New York*, 413 U. S. 345 (1974), this Court upheld a district court's ruling that an attempted intervention 17 days after the would-be intervenors first learned of the pendency of a suit then three months old was untimely under Rule 24. The suit had then reached a "critical stage" and it was "incumbent upon [them] at that stage of the proceedings, to take immediate affirmative steps to protect their interests . . . by way of an immediate motion to intervene." 413 U. S. at 367.[20]

The Court spelled out the general criteria for review of the district court's determination of timeliness under Rule 24 (413 U. S. at 365-66):

> Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely". If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all of the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.[21]

20. *See also SEC* v. *Bloomberg*, 299 F. 2d 315, 320 (2d Cir. 1962) (court of appeals affirmed denial of the SEC's motion to intervene in a reorganization proceedings as untimely because the SEC had waited 40 days after it was in a position to intervene); *Hoots* v. *Pennsylvania*, 495 F. 2d 1095, 1097 (3d Cir. 1974) cert. den. 419 U. S. 884 (1974) (intervention denied because "petitioners could not reasonably claim ignorance either of the proceedings or the necessity for intervention at a much earlier date").

21. The same standards under Rule 24 apply in cases involving Title VII of the Civil Rights Act. *E.g.*, *EEOC* v. *United Air Lines*, 515 F. 2d 946 (7th Cir. 1975); *Black* v. *Central Motor Lines*, 500 F. 2d 407 (4th Cir. 1974).

As Judge Pell explained in dissenting below, where a class action is involved the determination of when intervention "is first appropriate relates to the question of adequacy of representation;" for it becomes necessary for unnamed class members to intervene at the point when their interests are no longer being protected by the class representatives. A. 112. See *Alleghany Corp.* v. *Kirby*, 344 F. 2d 571, 574 (2d Cir. 1965), cert. granted 381 U. S. 933, cert. dismissed as improvidently granted, 384 U. S. 28 (1966).

When class action was here denied in December 1972 and the action was thus "stripped of its class character" under Rule 23, Ms. McDonald was required then to take "immediate affirmative steps" to protect her interests. As the dissenting judge below stated (A. 113):

> When petitioner's application for intervention is viewed in the light of [the above] cases, it appears clear to me that the motion was untimely. Petitioner admits knowledge of the class action denial in Romasanta in 1972 and yet offers no persuasive reason for her failure to petition to intervene then. Once the class was denied, and the suit proceeded as an individual action, she had no reason to believe her interests were being represented or protected by others. This was particularly true since the class action denial had the effect of excluding from the case all those who, like petitioner, had not protested the no-marriage rule. There was no longer anyone similarly situated to petitioner in the case.

Thus even if Ms. McDonald's motion in October 1975 had not been barred because of the expiration of the limitation period, it is clear that the district judge did not abuse the discretion vested in him under Rule 24 in finding that her motion to intervene came too late.

The admonition of the concurrence in *American Pipe* is singularly appropriate (414 U. S. at 561-62):

> Our decision, however, must not be regarded as encouragement to lawyers . . . to frame their pleadings as a class action . . . to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.
>
> . . . The proper exercise of this discretion [by the district judge under Rule 24(b)] will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

CONCLUSION.

For the foregoing reasons, we respectfully request that the decision of the court of appeals be reversed and that the decision of the district court of October 21, 1975, denying the petition of respondent to intervene be affirmed.

Respectfully submitted,

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APPENDIX.

PARTIES.

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24.

INTERVENTION.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. § 2403.